

*United States Court of Appeals
for the Second Circuit*



BRIEF FOR
APPELLEE

76-1431

To be argued by
JOHN S. SIFFERT

16
JJS

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1431

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM ALGARIN and JOSE COLON RODRIGUEZ,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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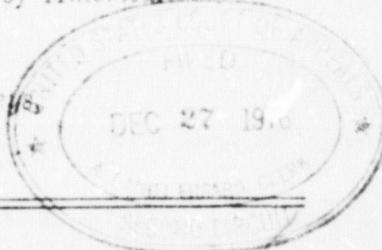


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WILLIAM ALGARIN AND JOSE COLON RODRIGUEZ,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal by William Algarin and Jose Colon Rodriguez from judgments of conviction entered on September 20, 1976 in the United States District Court for the Southern District of New York after a three-day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 76 Cr. 445, filed on May 4, 1976 charged Algarin, Rodriguez and two others in five counts with various violations of the narcotics laws. Count One charged Algarin, Rodriguez, Pedro Vasquez and Gerardo Medina Martinez with conspiracy to violate the federal narcotics laws from January 1, 1976 to May 4, 1976, in violation of Title 21, United States Code, Section 846. Counts Two, Three and Four charged the defendant Martinez with distributing and possession with intent to

distribute various quantities of heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Count Five charged all defendants with distribution and possession with intent to distribute four and one-half ounces of heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and Title 18, United States Code, Section 2.

On July 20, 1976, the first day of the trial, defendant Martinez pleaded guilty to all five counts in the indictment. The trial then commenced with defendants Vasquez, Algarin and Rodriguez on Counts One and Five.

At the conclusion of the evidence, the court dismissed Count One, the conspiracy count, without explanation but permitted the Government to argue that defendants were responsible as aiders and abettors and co-conspirators on the fifth count. (Tr. 282, 283-84).* On July 22, 1976 the jury returned the verdict convincing Algarin and Rodriguez on the remaining count, Count Five. The jury acquitted the defendant Vasquez on Count Five.

On September 21, 1976 the court sentenced Algarin by suspending imposition of sentence and placing Algarin on probation pursuant to the Young Adult Offender Act, Title 18, United States Code Section 5010(a). Rodriguez was sentenced to one year, with three months to be served in a jail-type institution; execution of the remainder of the sentences was suspended and Rodriguez was placed on three years' probation to run concurrently with three years' special parole.* Appellant Rodriguez is on bail pending this appeal.**

* "Tr." refers to pages of the trial transcript; "GX" refers to Government Exhibit; "Br." refers to the brief on appeal of the specified appellant.

** On August 24, 1976, the court sentenced Martinez to five years' imprisonment followed by three years special parole on each of the five counts to run concurrently.

Statement of Facts

A. Synopsis

The Government's evidence, presented through the testimony of six witnesses and various exhibits, established that on April 28, 1976 Algarin and Rodriguez aided and abetted Martinez in distributing, and possessing with intent to distribute, approximately four and one-half ounces of heroin. Specifically, the proof showed that on April 28, 1976 an unknown male handed four and one-half ounces of heroin to Detective Horace Balmer, an undercover agent assigned to the New York Drug Enforcement Task Force ("NYDETF"), with the assistance of Martinez and Rodriguez inside a bar while Algarin guarded the door outside. The defendants were immediately arrested.

B. The Government's Case

On February 20, 1976, Martinez was introduced to Detective Balmer by a confidential informant for the purpose of selling the undercover agent one ounce of heroin. (Tr. 26). Martinez, Detective Balmer and the informant drove to 133 Avenue D, the address of the Riverbend Club, a bar, owned by defendant Rodriguez's brother-in-law and managed by the defendant Rodriguez. (Tr. 27, 243, 253; GX 9). Martinez entered the Riverbend and returned to the ~~car~~ couple of minutes later. (Tr. 27). Martinez and Detective Balmer proceeded to 347 East 10th Street where Martinez gave the undercover agent one ounce of heroin in exchange for \$1800.

On February 26, 1976, at 347 East 10th Street, Martinez sold Detective Balmer two ounces of heroin in exchange for \$3,400. This second transaction was tem-

porarily interrupted by a knock on the door, as Martinez was counting the money. (Tr. 38). After checking to be sure that the knock was not from the police, Martinez opened the door and two men entered. Martinez told Detective Balmer that one of the men was his brother-in-law. (Tr. 38-40). The evidence later revealed that Algarin is Martinez's brother-in-law. (Tr. 149, 189). The sale was completed, although approximately four hundred dollars was missing after the two men had entered the apartment and the money count resumed. In a face to face meeting between Detective Balmer and Martinez on February 27, 1976, which was recorded on tape, Martinez agreed to discount the price of next package by two hundred dollars. (GX 5). At the same time Martinez revealed that he had just sold 60 ounces of heroin in one day. (Tr. 54; GX 5a). About two weeks later, Martinez confided to Detective Balmer that he had sold 300 ounces of heroin within a week and expected a new shipment of 600 ounces from Chicago shortly. (Tr. 58).

On March 12, 1976 Martinez sold Detective Balmer a third package of heroin consisting of one and one-half ounces. The sale took place in the bedroom of 60 Columbia Street, Apartment 13D, the same address where defendant Algarin resided. (Tr. 61, 189). Defendant Rodriguez's name also appeared on the door to that apartment. (Tr. 64, 168).*

* Only Martinez was named in Counts Two, Three and Four which charged the sales on February 20, 26 and March 12, 1976; however, each of these sales was charged as overt acts in furtherance of the conspiracy, Count One, in which all defendants were also named. Although the conspiracy count was dismissed at the close of the evidence, the Government was permitted to argue the events of February 20, 26 and March 12, 1976 which preceded the April 28th sale of four and one-half ounces of heroin—the sale which constitutes Count Five—as proof of the joint venture between Algarin, Rodriguez, Vasquez and Martinez. (Tr. 283-84).

On April 27, 1976 Detective Balmer placed a telephone call to Martinez after unsuccessfully trying to locate him at 10th Street. (Tr. 65). They agreed to meet the following day at one o'clock on the corner of 11th Street and Avenue B. On April 28, 1976, Detective Balmer drove to 11th Street and Avenue B in the company of Detective Wright, who was also acting in an undercover capacity. Surveillance teams observed the sequence of events from an undercover truck, official vehicles and on foot. (Tr. 154, 172). At 1:40 P.M., Detective Balmer was met by Martinez who stated that he was waiting for his connector, (Tr. 67, 174). Martinez then introduced Detective Balmer to Vasquez as someone "who was there to make sure that everything went smoothly" and Detective Balmer as "a person that was copping heroin." (Tr. C-69). Martinez told Detective Balmer to return later. At approximately 2:30 Detective Balmer returned with Detective Wright. Martinez introduced Detective Balmer to Algarin as Martinez's "brother." (Tr. 72, 175). Martinez told Detective Balmer to return at 3:30 and that "if he wasn't there, to speak to Mr. Algarin and he would tell me [Detective Balmer] where [Martinez] was, or go get him." (Tr. 73). Martinez told Detective Balmer in Algarin's presence that Detective Balmer would get the four ounces of heroin at 3:30. (Tr. 73, 74, 175).

Detective Balmer left the area and returned again at 3:30. (Tr. 73, 176). Martinez and Algarin approached Detective Balmer. Martinez told Detective Balmer in Algarin's presence that everything was going to be all right and to be patient. (Tr. 74, 176). Algarin then signalled to Vasquez to join the conversation. (Tr. 75, 177, 233). Vasquez asked if Martinez had checked the money and Martinez told Detective Palmer that he wanted to count the money. (Tr. 75).

Detective Balmer asked Detective Wright to get the money from the trunk of the undercover car, which De-

tective Wright did. Detective Balmer and Martinez entered the hallway of 170 Avenue B to count the money. Martinez instructed Algarin and Vasquez to "cover the entrance." Algarin and Vasquez remained outside and covered Martinez. (Tr. 76, 77, 178-79). Once inside, Detective Balmer refused to count the money in the hallway, so Detective Balmer and Martinez went next door to 172 Avenue B, the Yabuoa Club. Algarin and Vasquez again remained outside guarding the door. (Tr. 78, 180). Detective Balmer counted \$6800 out of the package of \$12,000. (Tr. 79). Vasquez called back to see if everything was all right and Martinez replied, "Everything is everything." Detective Balmer and Martinez then exited the bar and joined Algarin, Rodriguez and Detective Wright outside.

Detective Balmer gave the money to Detective Wright who replaced it in the trunk. Martinez told Detective Balmer "to wait there, be patient, the man would be there shortly." (Tr. 79, 181). Before Vasquez parted, he tossed a set of keys to Martinez and Algarin who started walking south on Avenue B toward 10th Street. Algarin and Martinez then continued south and Vasquez proceeded north on Avenue B toward 11th Street. (Tr. 181).

Detective Klopfer, who was acting in a surveillance capacity, followed Algarin and Martinez to the Riverbend Club on Avenue D between 9th and 10th Streets. Martinez entered using a set of keys. Algarin remained outside. (Tr. 155). Martinez exited two minutes later and proceeded with Algarin south on Avenue D to 8th Street. At the corner, they met defendant Rodriguez where they had a conversation. (Tr. 155-56). Rodriguez then walked north; Martinez walked south; and Algarin remained on the corner. (Tr. 157). Martinez and Rodriguez both returned after a few minutes. The three men talked

briefly. They then proceeded north on Avenue D "but not next to each other. Rodriguez walked to the rear and Martinez and Algarin walked ahead of him." (Tr. 158). Once at 10th Street the three men walked west. "[A]s they grew closer to Avenue B, the distance between them grew greater until they appeared to be separated." (Tr. 158).

As Algarin, Rodriguez and Martinez reached Avenue B and 10th Street, Vasquez joined them briefly but then departed, walking north. (Tr. 182). Martinez crossed Avenue B and told Detective Balmer: "Be patient, everything was okay." (Tr. 81). Martinez returned to the far side of Avenue B and spoke with Algarin and Rodriguez. A few moments later, Martinez, Algarin and Rodriguez crossed the avenue towards Detective Balmer. Martinez directed Detective Balmer to re-enter the Yabuoa Club. (Tr. 82, 183). Detective Balmer, Martinez and Rodriguez entered the Yabuoa Club. Algarin remained outside guarding the door. (Tr. 82, 183).

Once inside the Yabuoa Club Detective Balmer met another male whom he had not seen before. (Tr. 82-83). In the presence of Martinez and Rodriguez, the unknown male handed Detective Balmer a large plastic bag and said: "the best heroin you ever had in you life. This is the best." (Tr. 83). Detective Balmer took the bag and placed it under his belt. Detective Balmer said that the money was in the trunk of his car and started toward the exit. (Tr. 83-84).

Rodriguez put his hand on Detective Balmer's chest and pushed him back, saying "Hey, you are not going, you are not leaving the club." Detective Balmer replied that he had to go to the car to get the money. Martinez tried to convince Rodriguez and the unknown male that it was all right for Detective Balmer to leave, because he had seen the money in the trunk. As they argued, Rodri-

guez and the unknown male became distracted, giving Detective Balmer an opportunity to sneak out of the Yabucoa Club. Detective Balmer opened the truck of the car thus giving the signal for the arrest. (Tr. 84-85).

Algarin, Rodriguez and Martinez were arrested on the scene, placed in the back seat of one car and taken to the NYDETF headquarters. Ten minutes later, Vasquez was also arrested as he was exiting a building on 10th Street.

C. The Defense Case

Defendants Vasquez and Rodriguez testified in their own behalf. Algarin offered no evidence on his own behalf.

Vasquez essentially admitted to his presence at each of the occasions but explained that he was initially present at 1:30 and 3:30 because he was playing numbers. He admitted to meeting Detective Balmer and talking briefly with Martinez at 3:30, but asserted that his conversation with Martinez had nothing to do with heroin. Vasquez testified that Martinez had asked him as a favor to sell his car. (Tr. 220). Vasquez claimed that at 3:30 p.m.—the time Detective Balmer and Martinez counted the money—Martinez had told him to wait until he finished talking to Detective Balmer “and then I'll give you the keys to my car.” (Tr. 233). Vasquez also testified that he saw Algarin and Martinez talking together with Detective Balmer before Algarin beckoned him to come over. (Tr. 233).

Thus Vasquez contradicted no witness except Detective Balmer and, then, the contradictions were mostly limited to the substance of conversations that Detective Balmer attributed to Martinez and Vasquez. Moreover, Vasquez

was able to argue that he was present at 3:30 P.M. on April 28, 1976 in front of 170 Avenue B and 172 Avenue B not as a guard, but rather because he was waiting for Martinez to give him the keys for Martinez's car. Moreover, Vasquez did not guard the door to Yabucoa Club when the heroin was actually delivered. The Government did not rebut the fact that at the time of Vasquez's arrest Vasquez was holding Martinez's registration for Martinez's Grand Prix automobile. (Tr. 221).

Rodriguez also testified. His story was inherently unbelievable, replete with inconsistencies and contradicted by several witnesses in the Government's direct and rebuttal case. Rodriguez at first testified that he was on Avenue D and 8th Street to mail a letter, which he described as a business letter. This became a letter to pay taxes, although it was on April 28, after taxes are due. He then stated he did not recall to whom the letter was addressed. Finally he stated that he mailed more than one letter. (Tr. 257-58).

Rodriguez admitted meeting Martinez and Algarin on the corner of Avenue D and 8th Street but professed to have asked why Martinez had not frequented the bar in the past three months. The proof, of course, had shown Martinez had been at the bar just two months before. (Tr. 27, 259).

Rodriguez denied the sequence of events described by Detective Klopfer in the Government's direct case. Rodriguez denied returning to the corner of 8th Street and Avenue D to talk with Algarin and Martinez after the initial conversation, although Detective Klopfer testified that he had. Rodriguez further denied that he, Algarin and Martinez fanned out as they approached Avenue B and 10th Street. Rodriguez also denied having stood

on the corner of 10th Street and Avenue B in conversation with Algarin, although both Detectives Kilgallon and Balmer testified he did. (Tr. 263, 80-82, 182-83). Rodriguez flatly claimed Martinez and Algarin disappeared at the time he entered the Yabucoa Club. (Tr. 264). Rodriguez denied entering the bar with Detective Balmer, again contradicting both Detectives Kilgallon and Balmer. (Tr. 265). Rodriguez further contradicted Detective Balmer as to the incidents which occurred inside the Yabucoa Club, asserting that he had merely entered to get a drink from the bar, and that in leaving the Club Detective Balmer bumped into him. (Tr. 247, 265-67).

Finally, on cross-examination Rodriguez denied saying to Martinez in the car after his arrest, "I told you the black guy [Balmer] was a shrimp [undercover cop]." (Tr. 268). He also denied hearing Algarin tell Martinez in the car, "I hope they don't find the keys." (Tr. 269).

Rodriguez admitted that at the NYDETF headquarters he told Detective Klopfer that the keys which had been retrieved from Martinez were his own keys for the Riverbend Bar. (Tr. 159, 271).

D. Government's Rebuttal Case

The Government called one rebuttal witness, Detective Angel Rodriguez. Detective Rodriguez testified that after their arrest Martinez, Rodriguez and Algarin were placed in the back seat of the car. En route from 10th Street and Avenue B to the headquarters, both Algarin and Rodriguez voluntarily made statements to Martinez in Spanish which Detective Rodriguez understood. (Tr. 273-74). Algarin told Martinez, "I hope they don't find the keys." Defendant Rodriguez told Martinez "I told you

the black guy was a shrimp." (Tr. 275).* Detective Rodriguez explained that, "In street talk, [shrimp] means a policeman or a cop, a police officer out of uniform." (*Id.*).

ARGUMENT

POINT I

There Was Sufficient Evidence For The Jury To Find Algarin And Rodriguez Guilty Beyond A Reasonable Doubt.

Both Algarin and Rodriguez raise only one issue on this appeal, each claiming that the evidence was insufficient to sustain his conviction. For the purposes of determining whether a reasonable juror might fairly find the defendants guilty, *United States v. Falcone*, Dkt. No. 76-1237, slip op. 351 (2d Cir., Nov. 1, 1976); *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), the facts must be viewed in the light most favorable to the Government. *United States v. Martin*, 523 F.2d 703 (2d Cir. 1975); *United States v. DeGarces*, 518 F.2d 1156 (2d Cir. 1975). The evidence here plainly linked both Algarin and Rodriguez to Martinez's extensive heroin distribution scheme and permitted them to be convicted as aiders and abettors on the substantive count—Count Five.

* These conversations had been offered as admissions in the Government's case-in-chief but were excluded by the court for unstated reasons. (Tr. 92-93). They were admitted in the rebuttal case and, at the request of Government counsel, limiting instructions were given that the statements were admitted only as to Rodriguez's credibility. (Tr. 275). Nonetheless, the statements are probative of both Algarin's and Rodriguez's guilty knowledge.

A. Algarin

Algarin was connected "to every stage of [Martinez's] actions" on April 28, 1976, from negotiations to delivery of the heroin. *United States v. MacDougal-Pena*, Dkt. No. 76-1320, slip op. 680 (2d Cir., Dec. 1, 1976). Algarin personally furthered the heroin distribution by acting as lookout and guard both when the money was counted and the heroin was transferred, after Algarin knew the illicit purpose of the transactions. At 2:30 p.m., Algarin heard Martinez tell Detective Balmer that he would receive four ounces of heroin in an hour and that Detective Balmer should return at 3:30 P.M. to get the heroin. (Tr. 73, 74, 75). Martinez also told Detective Balmer that at that time Algarin would know where to find Martinez to conclude the heroin transaction. Knowing the purpose of these meetings, Algarin nonetheless proceeded to obey Martinez's instructions to "cover me" and guarded the doorway to 170 Avenue B and then 172 Avenue B, while the money was counted. (Tr. 76-78, 178-80). Algarin next accompanied Martinez to Avenue D and 8th Street, including the stop at the Riverbend, in what obviously were negotiations with Rodriguez concerning the delivery of the four and one-half ounces of heroin. (Tr. 155-58). When the three defendants returned to Avenue B, Algarin attempted to conceal his involvement by pretending to have nothing to do with the others. (Tr. 158). Finally, Algarin guarded the door to the Yabuoa Club when the heroin was actually transferred inside. (Tr. 82, 183). From this conduct "[t]he jury could find that [Algarin] acted as a lookout for the group and did not innocently go along with the others 'just for the ride.' . . . The jury could thus interpret appellant's conduct as indicating 'concern about possible police surveillance or interference from innocent passers-by'." *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), cert. denied,

415 U.S. 984 (1974). (Citations omitted). *United States v. Carneglia*, 468 F.2d 1084, 1088 (2d Cir. 1972), cert. denied, *sub nom. Inzerillo v. United States*, 410 U.S. 945 (1973).

This prior knowledge of the illegal enterprise and continued association with Martinez at the very hour when Algarin knew the illegal transaction would occur, together with his secretive and suspicious behavior when returning from Avenue D to Avenue B and his role as lookout at the time of the transfer, bring this case squarely within the holding of *United States v. Vilhotti*, 452 F.2d 1186, 1189 (2d Cir. 1971), cert. denied, 405 U.S. 1041 (1972). In *Vilhotti*, this Court upheld Vilhotti's conviction because "the evidence showed not only presence but also prior activity that indicated criminal knowledge." *United States v. Rizzuto*, 504 F.2d 419, 420 (2d Cir. 1974).* As a look-out or guard, Algarin had a vested interest in the outcome of the heroin transaction. *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), cert. denied, 405 U.S. 928 (1972). His behavior constituted more than an adequate basis for the jury to infer that Algarin was attempting to further the scheme and insure its success. The fact that Detective Balmer did not discuss the heroin sale with Algarin is of no moment, since the evidence was unrefuted that Martinez told Algarin that Detective Balmer was there to receive heroin and that covered Martinez both when the money was counted and when the heroin was transferred. This is more than the "bare presence" Algarin asserts. *United States v. Carneglia*, *supra*, 468 F.2d at 1087.**

* In this regard, it is significant that the jury acquitted the defendant Vasquez, who was present at the negotiations and money count, but not present when the heroin was transferred.

** The trial court specifically instructed the jury, to the satisfaction of counsel, that "mere association, without more, of any defendant is not sufficient by itself to establish membership in a joint enterprise." (Tr. 348). By its discriminating verdict, the jury evidently applied these instructions to the facts with care.

It is also appropriate to consider that Algarin offered no defense, except the "mere presence" defense asserted on appeal. As Judge Friendly observed in *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), cert. denied, 419 U.S. 828 (1974) :

"[T]he self-incrimination clause does not elevate a defendant's silence, much less failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version."

See also, *United States v. Parness*, 503 F.2d 430, 437 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Absent any exculpatory version offered by Algarin, the jury was entitled to draw inferences of knowledge and purposeful action from Algarin's suspicious, guarded, camouflaged and secretive behavior. Indeed Algarin's conviction should be sustained under the precedents of this Circuit in such cases as *United States v. Rizzuto*, 504 F.2d 419 (2d Cir. 1974); *United States v. D'Amato*, 493 F.2d 359, 364-65 (2d Cir. 1974); *United States v. Barrera*, 486 F.2d 333, 337 (2d Cir. 1973), in which this Court upheld convictions, after an attack for insufficiency, convictions based on evidence less compelling than in this case.

B. Rodriguez

Rodriguez similarly was linked to the joint venture. On the occasion of the first sale on February 20, 1976, before delivering the heroin to Detective Balmer, Martinez stopped off at the Riverbend Club, the bar managed by Rodriguez. (Tr. 27, 243, 253; GX 9). Rodriguez's

name also appeared on the apartment where the third sale took place, although Rodriguez denied, on cross-examination, prior acquaintance with Algarin who also lived there. (Tr. 258, 64, 168). Rodriguez met Martinez and Algarin on Avenue D shortly after Martinez told Detective Balmer that the heroin would arrive. Then, in an effort to conceal their association and illicit activity, Rodriguez, Martinez and Algarin returned to Avenue B but fanned out, as if they were not together. (Tr. 158). All these defendants entered the Yabucoa Club together. Once inside, Detective Balmer was handed the bag of heroin in Rodriguez's presence. Detective Balmer put it in his belt and was told it was "the best." (Tr. 83). As Detective Balmer started to leave under the guise of getting the money from the car, Rodriguez physically stopped him. Placing his hand on Detective Balmer's chest and pushing him back, Rodriguez said "you are not going, you are not leaving the club." (Tr. 84). Martinez and Rodriguez began quarrelling in Spanish. Detective Balmer was able to understand that "Martinez was indicating that I was all right and that the money was in the trunk, and Mr. Rodriguez was saying no . . ." (Tr. 85). As Detective Balmer began to sneak out, Rodriguez tried to stop him. (Tr. 116) but Detective Balmer exited and gave the arrest signal.

Rodriguez therefore actively furthered the actual heroin distribution on April 28, 1976. Indeed the jury could have properly inferred that Rodriguez was the "enforcer" who would not permit the narcotics customer to leave the scene with the heroin before there had been payment. Rodriguez's behavior permitted the jury to infer that Rodriguez "knew about the enterprise and intended to participate in it or to make it succeed." *United States v. Cirillo*, 499 F.2d 872, 883 (2d Cir.), cert. denied, 419 U.S. 1056 (1974).

Moreover, Rodriguez took the stand and testified. It is obvious thus the jury rejected in its entirely Rodriguez's account of the events. It is settled in this Circuit that the "incredibility inherent" in a defendant's story may be considered on appeal in addition to the proof in the Government's case in chief where the defendant attacks the sufficiency of the evidence. *United States v. Singleton*, 532 F.2d 199 (2d Cir. 1976); *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974); *United States v. Arcuri*, 405 F.2d 691, 695, n.7 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969). Accordingly, the jury was entitled to reject Rodriguez's explanation of the events on April 28, 1976 as false, and therefore find that Rodriguez was present in the Yabucoa Club with the illegal purpose of furthering the heroin distribution.

Counsel's attempt to persuade this Court to credit Rodriguez' story, (Br. 15-17), constitutes nothing more than an attempt to have this Court sit as a surrogate jury and substitute its view of the evidence without the opportunity to evaluate the witness' demeanor, a role which this Court repeatedly has declined to assume. See *United States v. Sears*, Dkt. No. 76-1154, slip op. 259 (2d Cir., Oct. 26, 1976); *United States v. Kahaner*, 317 F.2d 459, 467-68 (2d Cir.), cert. denied, 375 U.S. 835 (1963).*

* It should further be noted that Judge Pollack correctly recognized, without objection from counsel, that dismissal of the conspiracy count did not preclude the jury's consideration of Martinez' statements against Algarin and Rodriguez. *United States v. Lubrano*, 529 F.2d 633, 636 n. 1 (2d Cir. 1975); *United States v. Zane*, 495 F.2d 683, 692 (2d Cir. cert. denied, 419 U.S. 895 (1974)). Thus Martinez' statements were fully admissible against Algarin and Rodriguez once it was established by a fair preponderance of the non-hearsay evidence that there was a agency relationship. *United States v. Geaney*, 417 F.2d

[Footnote continued on following page]

In sum, there was more than sufficient evidence for the jury to conclude that Algarin and Rodriguez were knowing participants in the scheme to distribute heroin. Defendants' arguments fail to give "full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact." *United States v. Harris*, 435 F.2d 74, 88 (D.C. Cir. 1970), cert. denied, 402 U.S. 986 (1971); *Curley v. United States*, 160 F.2d 229, 232 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947).

1116, 1120 (2d Cir. 1969), cert. denied, *sub nom. Lynch v. United States*, 397 U.S. 1028 (1970). See F.R. Ev. 801 (d)(2)(1); *United States v. Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943), cert. denied 321 U.S. 744 (1944); See also *United States v. Ruggiero*, 472 F.2d 599, 607 (2d Cir.) cert. denied, 412 U.S. 939 (1973); *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969); *United States v. Annunziato*, 293 F.2d 373, 378 (2d Cir. 1961).

The evidence set forth above amply supported Judge Polack's findings that there was sufficient non-hearsay evidence that the defendants were co-schemers. As co-schemers, Algarin and Rodriguez are responsible for Martinez' statements and actions taken in furtherance of the scheme and the Government was entitled to a charge to that effect, although none was given. (See Tr. 283-84, 345, 348). Taking Martinez' statements and actions into account against Algarin and Rodriguez, there can be no argument of insufficiency of evidence of their participation in the distribution of heroin on April 28, 1976.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

John S. Saffer being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 27th day of December, 1976,
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in a properly postpaid franked envelope addressed:

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